THE INFLUENCE OF THE EIGHTEENTH NOVEL OF JUSTINIAN.—II.

III.

THE LIMITATION OF TESTAMENTARY DISPOSITION.

By the law of the Twelve Tables intestate property devolved first to *sui heredes*, then to the nearest agnate, and finally to the gentiles.

The prætorian edict passed the intestate's estate: first, to the children, emancipated and unemancipated; second, to *sui heredes*, and in default of these to the nearest agnate; third, to cognates; fourth, to the surviving husband and wife (Sohm's "Institutes," 439–42).

The 118th Novel of Justinian decrees intestate property: first, to the descendants; second, to ascendants, brothers and sisters of the whole blood, and children of pre-deceased brothers and sisters; third, brothers and sisters of the half blood and their children; fourth, nearest collaterals.

We now pass from intestate to testate succession. The transition of ownership from the family to the individual in Roman law, we have traced *supra*. The change as indicated was of a slow growth, and necessarily even when individual ownership was fully developed left remains of collective ownership.

M. Tarde mentions the right of *le retrait simplement lignager* (family recovery); that is to say, "the right accorded to relatives of the vendor to buy out in the same manner the purchaser foreign to the family," as a survival of the family right of ownership and as a limitation upon the individual right of property (*Les Transformations du Droit*, p. 66, and note).

"The title of the relatives of the deceased, and more especially of his own children, to succeed him on his death, is based on a rule of law, on a legal necessity, on the fact that, prior to his death they were co-owners of the property. * * * The idea of private ownership was destined to outstrip the traditional conception of family ownership, and the individual was allowed, through the medium of a will, to realize his absolute right of dis-

position (*i. e.*, his sole ownership), as against the family even after his death. * * * The claims of certain very near relations are so strong that they survive the recognition of individual ownership. * * * The view that there may be a succession contrary to the will, a succession by necessity, gains acceptance. In the old law these rules concerning succession by necessity mark the limits within which the conception of family ownership continues to operate on that of individual ownership" (Sohm's "Institutes," 409).

"The idea that property really belongs to a family group, and that the right of an individual is merely to administer his share of it during his lifetime, may be said still to survive in those provisions against the total disinheriting of relations which modern systems have borrowed from Roman law, and less obviously in the rights given to next of kin under statutes of distribution. The feudal doctrine as to the succession of the heir at law to real property, and of escheat in default of an heir, to the lord of the fee, is widely different in character. It is a consequence of this latter doctrine, that no one individual is recognized by English law as succeeding to all the rights of an intestate who dies leaving both real and personal property, and that the heir and the administrator divide between them what under the Roman system devolved wholly on the '*heres*' "(Holland's "Juris.," 142-3).

Let us now consider the right of testamentary disposition of the Law of the Twelve Tables as limited by the *Lex Falcidia* and the Eighteenth Novel of Justinian.

"For since formerly by the law of the Twelve Tables the right of bequest was free so that it was lawful to pay out indeed in legacies the whole patrimony; truly in such manner it was provided by this law: 'thus be the law as he has bequeathed his estate.' It has seemed best to limit this right of bequest, and this was provided for the sake of testators themselves on this account, because frequently (testators) used to die intestate for the reason that the appointed heirs refused to make *additio* to the inheritance because of little or no gain. * * * The *Lex Falcidia* has been passed most recently by which it is decreed, that it is not permitted to bequeath more than three-fourths of all the goods; that is, in such a way, that whether one or more heirs are appointed, a fourth part should remain with him or them" ("Institutes," II., 22, pr.).

The Eighteenth Novel "raised the amount of the statutory share to one-third of the intestacy share where the portion of

the inheritance which the claimant would have taken on intestacy amounted to at least one-fourth of such inheritance, and to one-half of the intestacy share, where such portion amounted to less than one-fourth of the inheritance" (Sohm's "Institutes," 467; *vide* 18th Novel *post*).

Sale's translation of the "Koran," page 60, reads: "God has thus commended you concerning your children. * * * If ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye bequeath, and your debts be paid."

We are now to see what has been the influence of the increasing of the intestacy share of children decreed by the Eighteenth Novel on subsequent foreign systems of law, and first of legitimate children.

LEGITIMATE CHILDREN.

Grotius' "Dutch Jurisprudence" (Herbert's translation) page 133: "Sec. 8. These children must be instituted as heirs in the aggregate to one-third share at least of that which they would have derived from the estate by succession, profit and loss together included; but in case the children exceed four in number, then they must be instituted as heirs for one-half, as before; these shares are called their legitimate portion. Sec. 5: But there are some who not only may, but even must, be instituted heirs; namely, children."

The French Civil Code provides: "913. Liberalities, either by acts of gift, or by will, can not exceed a moiety of the property of the disposer, if he leaves at his decease but one legitimate child; a third, if he leaves two children; a fourth, if he leaves three or a greater number. 914. Descendants in whatever degree they may be are comprised in the preceding article, under the name of children; nevertheless, they are only reckoned for the child whom they represent in the succession of the disposer.

"915. Liberalities, by acts of gift or by will, cannot exceed a moiety of the property, where in default of a child, the deceased leaves one or more ascendants in each of the paternal and maternal lines; and three-fourths, where he leaves ascendants but in one line. 916. In default of ascendants and descendants, liberalities by acts of gift or will may exhaust the entirety of the property."

Maine, in "Early Law and Custom," 111, says: "Englishmen are less interested * * * in all succession by law, through their almost universal habit of determining the devolution of their property by marriage settlement or wills. But on the Continent, principally through the operation of the French Code and of the codes modelled on it, the practice of testamentary disposition is said to be on the decline. The rights over the father's property secured to children are indefeasible, and the chief modern object of a will, the distribution of property among children according to their character and needs, being thus unattainable, wills fall into disuse and the law is left to settle the succession of more distant relatives."

The Italian Civil Code reads: "805. Liberalities by will cannot exceed one-half of the goods of the testator, if that one at his decease leaves children, whatever may be the number of said children. The other half is reserved for the benefit of the children and forms their portion.

"807. If the testator has left neither children nor descendants, but ascendants, he can dispose only of two-thirds of his goods. The legal portion, or the third, belongs to the father and to the mother in equal portions. * * * If the testator leaves neither a father nor mother, but ascendants in the paternal and maternal line, the statutory portion belongs one-half to one and one-half to the other.

"808. The *légitime* is a portion of the inheritance; it is due to children, descendants or ascendants in full right, and the testator can burden it with no charge or condition. 809. The testator, who leaves at his decease neither descendants nor ascendants, is able to dispose of his goods by universal or particular title."

"Institutes of the Civil Law of Spain," by Dr. Rio (Johnson's translation), page 117: "With respect to the mode in which a testator may dispose of his property, it is an indisputable principle of the laws of Castile, that if he has children or grandchildren, * * * he must necessarily institute them heirs, and can only dispose in favor of strangers, or other persons, of the remnant of one-fifth of his property. * * * In default of children and grandchildren a testator must devise or bequeath in favor of his father and grandfather, or ascendants, if he should have any, with the exception of the third, of which he can dispose freely. * * * 'All the property of the parents is the lawful portion or right of the children, with the exception of the fifth.' "

"Law of Scotland" (Burton, 105): "If a man dies leaving a widow and children, his moveables are divided into three parts—one goes to the widow, and is called *jus relictæ;* another goes to the children, and is called *légitime*, or bairn's part, and the third is called the dead's part. * * * If (the deceased) leave children and no widow, one-half goes to the children, the other is dead's part. * * * The *jus relictæ* and *légitime* can not be defeated by a testament. * * * The dead part * * * is the only part which can be conveyed by a testament or will." *Vide* Burns' "Ecclesiastical Law," 421.

Voorhies' Revised Civil Code of Louisiana (1889) reads: "Art. 1493. Donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number. Under the name children are included descendants of whatever degree they be. * * * Art. 1494. Donations * * * cannot exceed two-thirds of the property (if the testator) * * * leaving no children, leave a father, mother or both." Donations "may be made to the whole amount of the property" if deceased leaves neither descendants nor father or mother.

The Austrian Civil Code (Winiwarter) declares, "Sec. 762: The persons whom the testator is obliged to favor in his last disposition with a part of the inheritance, are his children; and in case of there being none, his parents. 765. The law allots to each child, as his legitimate portion, the half of what he would have obtained according to the legal succession. 766. Each legitimate heir in the ascending line, can as his legitimate portion, claim the third part of what he would have obtained according to the legal succession. 732. If the testator has legitimate children of the first degree, the whole inheritance falls to them (in case of intestacy)."

In Sweden, "if he leave issue, nor can he dispose of more than one moiety of the estate, the other moiety belonging by law to the issue as their *pars legitima*" (Jarman, "Wills," II., 784), and

In Norway, he "can only dispose of one-fourth of his property to the detriment of such issue."

Blackstone's "Commentaries," II. 491, recites: "We are not to imagine that this power of bequeathing extended originally to all a man's personal property. On the contrary, Glanvil will inform us that by the common law as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs; another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. * * * If he died without either wife or issue, the whole was at his own disposal.

"This continued to be the law of the land at the time of *Magna Carta*, and in the reign of King Edward III. this right of the wife and children was still held to be the universal or common law; * * * and Sir Henry Finch lays it down expressly in the reign of Charles I., to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration began."

The Statute of Wills (I. Victoria 26, 1837), enacts: Section 3, the general enabling clause, provides, "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will, executed, etc., all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death."

The law of testamentary disposition in the United States with respect to children is stated by Chancellor Kent as follows: "The remaining branch of parental duty consists in making competent provision, according to the circumstances and conditions of the father, for the future welfare and settlement of the child; but this duty is not susceptible of municipal regulations, and it is usually left to the dictates of reason and natural affection. Our laws have not interfered on this point, and have left every man to dispose of his property as he pleases, and to point out in his discretion the path his children ought to pursue. The writers on general law allow that parents may dispose of their property as they please, after providing for the necessary maintenance of their infant children and those adults who are not of ability to provide for themselves. A father may, at his death, devise all his estate to strangers, and leave his children upon the parish; and the public can have no remedy by way of indemnity

against the executor. 'I am surprised,' said Lord Alvarlay, 'tha this should be the law of any country, but I am afraid it is the law of England.' "

Having traced the limitation of testamentary disposition in several countries with regard to legitimate children, the consideration of natural offspring will now occupy our attention.

NATURAL CHILDREN.

The French Code declares (Sec. 757): "The right of the natural child in the property of his father or mother deceased is regulated in manner following: Where the father or the mother has left legitimate descendants, this right is to one-third of the hereditary portion which such natural child would have had, if he had been legitimate; it is to one-half where the father or mother have no descendants, but yet ascendants or brothers or sisters; it is to three-fourths where the father or mother leave neither ascendants nor descendants, nor brother nor sisters.

"758. The natural child has a right to the whole of the property, where his father or mother leave no kindred of a degree capable of succeeding.

"759. In case of the predecease of a natural child, his children or descendants may claim the rights defined by the preceding articles."

The Italian Civil Code reads, 815: "When the testator leaves children or descendants legitimate, and natural children legally acknowledged, these have rights to a moiety of the part which would belong to them if legitimate.

"816. When there are neither legitimate descendants nor ascendants, the natural children have right to two-thirds of the part which would belong to them if they were legitimate.

"817. Legitimate descendants of a natural child predeceased can reclaim the rights established to their advantage in the preceding articles."

The Code of Louisiana declares: "Art. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to the inheritance either the surviving husband or wife, or his or her natural children, or the State.

"Art. 1486. When the natural father has not left legitimate children or descendants, the natural child or children acknowl-

edged by him may receive from him, by donation *inter vivos* or *mortis causa* to the amount of the following proportions, to wit:

"One-fourth of his property, if he leaves legitimate ascendants or legitimate brothers or sisters or descendants from such brothers and sisters; one-third, if he leaves only more remote collateral relations."

Our last conclusion of the influence of the Eighteenth Novel is the limitation of testamentary disposition in Holland, France, Italy, Spain, Louisiana, Austria, Sweden and Norway, in the whole estate, and in Scotland and England before the Conquest in personalty only, in favor of legitimate descendants to a certain portion thereof; in default of such in France, Italy, Spain, ascendants receive a certain portion of the patrimony, and in Louisiana and Austria, the immediate ascendants—the father and mother. And in France, Italy and Louisiana, on failure of legitimate descendants and ascendants as aforesaid, the natural children receive a certain portion of the testator's property.

SUMMARY:

The Eighteenth Novel of Justinian has been the fountain head of intestate cognatic succession, determining the degrees of descendants and ascendants in modern systems of law.

The principle of intestate cognatic succession has produced individual ownership and contract; accelerated the conception of individual ownership, and produced legal equality.

The limitation of testamentary disposition in favor of legitimate children by increasing their portion has determined succession by necessity in favor of legitimate children in many modern systems of law, and has been extended in France, Italy and Louisiana, as aforesaid to natural children and ascendants.

The Past glories in the Roman Empire, whose laws ruled the civilized world. The Present claims the Church of Rome, still ruling over many nations of the Earth, as a survival of the Empire. The private law of Rome also is a living institution as incorporated in modern systems of law, and the *jus civile* now serves as the foundation for public and private international law.

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